

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

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Docket No. 185,977

## ORDER

On August 2, 1995, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler on March 9, 1995, came on for oral argument by telephone conference.

## APPEARANCES

Claimant appeared not having resolved this matter with the respondent on March 7, 1994. Respondent and its insurance carrier appeared by and through their attorney Stephen A. McManus of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Randy Manvitz of Kansas City, Kansas. There were no other appearances.

## RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

**STIPULATIONS**

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

**ISSUES**

- (1) Whether claimant suffered accidental injury on or about August 14, 1992;
- (2) The nature and extent of injury and disability of the claimant, including the reasonableness of the settlement entered into between the claimant and the respondent for the accident of August 14, 1992;
- (3) The liability, if any, of the Kansas Workers Compensation Fund;
- (4) The entitlement of the fund to a credit pursuant to K.S.A. 44-510a; and
- (5) The jurisdiction of the Appeals Board to consider a fraud and abuse claim against the Kansas Workers Compensation Fund pursuant to K.S.A. 44-5,120.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

K.S.A. 44-5,120 states in part:

"(a) The director of workers compensation is hereby authorized and directed to establish a system for monitoring, reporting and investigating suspected fraud or abuse by any persons who are not licensed or regulated by the commissioner of insurance in connection with securing the liability of an employer under the workers compensation act or in connection with claims or benefits thereunder. The commissioner of insurance is hereby authorized and directed to establish a system for monitoring, reporting and investigating suspected fraud or abuse by any persons who are licensed or regulated by the commissioner of insurance in connection with securing the liability of an employer under the workers compensation act or in connection with claims thereunder."

K.S.A. 44-5,120 grants the authority to establish a system for investigating and reporting fraud and abuse to either the Director of Workers Compensation or to the Commissioner of Insurance depending upon the circumstances. The Workers Compensation Appeals Board has no jurisdiction to consider fraud and abuse. As such, the issue regarding respondent's allegation of fraud and abuse against the Workers Compensation Fund will not be considered by the Appeals Board.

Claimant and respondent settled this matter on March 7, 1994, with the Fund being present and reserving all issues at that time. The Fund specifically contends claimant did not suffer accidental injury on or about August 14, 1992. The facts contained in the record defeat the Fund's argument. Claimant is a driver for UPS and suffered accidental injury on July 28, 1989 and again August 14, 1992 while delivering for the respondent. The injury

described in 1989 occurred as a result of claimant moving quickly to get out of the way of falling packages. Claimant was off work receiving temporary total disability for a period of time and was diagnosed as having degenerative disc disease with a prominent disc at L5-S1. Claimant described her August 14, 1992 injury as occurring when she bent over to pick up a package. Claimant was unable to straighten up as a result of this incident and left work, proceeding immediately to the doctor. At that time, a follow-up MRI indicated claimant had disc degeneration at L5-S1 with a small focal central disc protrusion at that level. Both Dr. David Clymer, a board certified orthopedic surgeon, and Dr. Peter Bieri, a disability evaluation specialist, opined claimant had suffered increased impairment as a result of the August 14, 1992 incident. While claimant testifies that she did not have an accident on August 14, 1992, her description of the incident clearly indicates she had a sudden onset of pain with an increase in symptomatology. This indicates that under the definition of "accident" contained in K.S.A. 44-508 claimant did suffer a lesion or change in the physical structure of the body causing damage or harm thereto so that it gave way under the stress of the worker's usual labors. As such, the Appeals Board finds claimant suffered accidental injury on or about August 14, 1992.

Dr. Clymer, in his evaluation of claimant, found additional symptomatology subsequent to the August 14, 1992 injury. He increased claimant's functional impairment rating from four percent (4%) of the body as a whole to six percent (6%) of the body as a whole as a result of this subsequent injury testifying that claimant has suffered two separate injuries. He went on to state that the second injury in August 1992 would not have occurred but for claimant's preexisting impairment. He further testified that he felt claimant had suffered a permanent aggravation of her preexisting condition as a result of this injury. Dr. Peter Bieri, a specialist in disability evaluations, testified he thought claimant had sustained two separate injuries with both being sustained as a result of acute trauma. He testified that sixty-six percent (66%) of claimant's current impairment was attributable to the injury of August 14, 1992, with the balance being attributable to the preexisting condition. When asked whether he felt claimant would not have suffered the injury but for her preexisting condition, Dr. Bieri testified in the affirmative. He also, unfortunately, testified that he felt this was a contribution situation and further, that since claimant had degenerative disc disease there is a possibility that there was no second accident on August 14, 1992. The Appeals Board finds the testimony of Dr. Clymer to be more credible, with Dr. Clymer's opinion being more consistent than that of Dr. Bieri. As such, the Appeals Board finds there is justification for finding that but for claimant's preexisting condition she would not have suffered the injury on August 14, 1992. K.S.A. 1992 Supp. 44-567 addresses the issue of Fund liability and provides in part:

"(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

K.S.A. 44-566(b) defines a handicapped employee as:

". . . one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining

employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

K.S.A. 1992 Supp. 44-567(b) provides in part:

"In order to be relieved of liability under this section, the employer must prove either that the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In this instance, the Appeals Board is persuaded that the respondent has met its burden of proof that it retained a handicapped employee within the definition contained in K.S.A. 1992 Supp. 44-567(b). The Appeals Board further finds that respondent had knowledge of this handicap sufficient to satisfy the requirements of K.S.A. 1992 Supp. 44-567(b) and further finds that the respondent retained the handicapped employee after acquiring such knowledge.

The Appeals Board finds based upon the testimony of the claimant, coupled with the testimony of Dr. Clymer, that the total responsibility for the injury suffered August 14, 1992 should be that of the Kansas Workers Compensation Fund.

The final issue to be decided deals with the Fund's entitlement to a credit pursuant to K.S.A. 44-510a. The Appeals Board finds it disturbing that the issue of credit was never raised by the Workers Compensation Fund at the time of the settlement hearing or at the time of regular hearing before the Administrative Law Judge. In fact, the record indicates that, when the attorney for the respondent was asked by the Administrative Law Judge, the attorney advised that the appropriate K.S.A. 44-510a credit had been taken into consideration at the time of settlement. Nevertheless, the Appeals Board does understand that an Administrative Law Judge, when dealing with a situation where the Workers Compensation Fund reserves all rights and all issues, after having had the opportunity to review the appropriate record, must fully decide the matter.

The settlement between the claimant and respondent for the August 14, 1992 injury was based upon a six percent (6%) whole body functional impairment provided from Dr. Clymer. Claimant was paid 9.28 weeks temporary total disability and the average weekly wage of \$739.32 was properly utilized in the computation of the settlement. The Appeals Board finds when using the above average weekly wage and temporary total disability, claimant would be entitled to an award of \$11,997.14. The settlement paid to claimant at the time of the settlement hearing in March 1994, was \$7,199.24. This gives clear indication that the appropriate K.S.A. 44-510a credit was utilized when reaching the settlement between claimant and respondent. As such, the Award of Administrative Law

Judge Robert H. Foerschler, wherein it reduces the Fund's reimbursement to the respondent by an additional \$3,984.53, is not proper and is reversed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that an Award of compensation is herein made in accordance with the above findings in favor of the respondent and its insurance carrier and against the Kansas Workers Compensation Fund for 100% of the costs associated with the August 14, 1992 injury.

The Kansas Workers Compensation Fund shall pay to the respondent 100% of the Award and all costs associated with this matter as previously settled and shall be entitled to no additional credit under K.S.A. 44-510a.

The respondent's claim of fraud and abuse against the Kansas Workers Compensation Fund pursuant to K.S.A. 44-5,120 is herein dismissed.

Costs associated with the administration of the Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund as follows:

Hostetler & Associates, Inc.

\$824.85

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stephen A. McManus, Kansas City, Kansas  
Randy Manvitz, Kansas City, Kansas  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director